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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 335

THE HANOVER SHOE, INC.,
Petitioner,

v.

UNITED SHOE MACHINERY CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
The Reasons for Granting the Writ	9
As to the tax error	9
As to the error fixing a cut off date for damages other than the applicable statute of limitations	14
Conclusion	18

TABLE OF CASES

A. C. Becken Co. v. *Gemex Corp.*, 1961 Trade Cases ¶70,118 (N.D. Ill. 1966), aff'd. 314 F. 2d 839 (7th Cir. 1963), *cert. denied*, 375 U. S. 816 (1963) 12fn

American Tobacco Co. v. *United States*, 328 U. S. 781 (1946) 3, 7, 8, 14, 15, 16, 18

Charles Rubenstein, Inc. v. *Columbia Pictures Corp.*, 176 F. Supp. 527 (D.C. Minn. 1959), aff'd., 289 F. 2d 418 (8th Cir. 1961) 12fn

Commissioner of Internal Revenue v. *Glenshaw Glass Co.*, 348 U. S. 426 (1955) 3, 6, 9, 10, 11, 12, 13

The Hanover Shoe, Inc. v. *United Shoe Machinery Corporation*, 185 F. Supp. 826 (M.D. Pa. 1960), aff'd., 281 F. 2d 481 (3d Cir. 1960), *cert. denied*, 364 U. S. 901 (1960) 13

PAGE

North Texas Producers Assn. v. *Metzger Dairies*, 348 F. 2d 189 (5th Cir. 1965), *cert. denied*, 382 U. S. 977 (1966) 12fn

Sterling Nelson & Sons, Inc. v. *Rangen, Inc.*, 235 F. Supp. 393 (D.C. Idaho 1964), aff'd., 351 F. 2d 851 (9th Cir. 1965), *cert. denied*, 383 U. S. 936 (1966) 12fn

Straus v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924) 11fn

Union Carbide and Carbon Corp. v. *Nisley*, 300 F. 2d 561 (10th Cir. 1961), *appeal dismissed*, 371 U. S. 801 (1962) 12fn

United Shoe Machinery Corporation v. *United States*, 258 U. S. 451 (1922) 17fn

United States v. *United Shoe Machinery Corporation*, 110 F. Supp. 295, *affirmed, per curiam*, 347 U. S. 521 (1954) 6

United States v. *United Shoe Machinery Co.*, 247 U. S. 32 (1918) 17fn

United States v. *Winslow*, 227 U. S. 202 (1913) 17fn

Statutes:

Clayton Act (38 Stat. 731, 15 U.S.C.A. §15):

Section 4 3

Clayton Act (38 Stat. 731; 69 Stat. 283; 15 U.S.C.A. §16a):

Section 5a 3, 7

Sherman Act (26 Stat. 209; 69 Stat. 282; 15 U.S.C.A. §2):

Section 2 ..... 3, 6, 7, 14, 17

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No.

THE HANOVER SHOE, INC.,

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UNITED SHOE MACHINERY CORPORATION,

Respondent.

Petitioner prays that a writ of certiorari issue to review the amended judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on June 7, 1967.

Opinions Below

The Findings of Fact, Conclusions of Law and Opinion of the District Court for the Middle District of Pennsylvania are printed, R. 720a-800a,* and reported 245 F. Supp. 258-299. The Supplemental and Amended Findings of Fact, Conclusions of Law and Opinion as

* References to the Record in the District Court are to pages of Petitioner's and Respondent's separate appendices in the Court of Appeals and are preceded by the letter "R" and followed by the letter "a" in the case of Respondent's Appendix and the letter "b" in the case of Petitioner's Appendix. References to the Appendices hereto are preceded by the designation "Appendix" or "App.".

Amended are printed, R. 855a-871a, and reported 245 F. Supp. 299-308. The opinion of the Court of Appeals is printed in Appendix A hereto, 1a-33a. The supplemental opinion following denial of rehearing and the Court's *per curiam* decision denying rehearing are printed in Appendix A, 34a-38a. The opinion and supplemental opinion of the Court of Appeals are not yet officially reported.

Jurisdiction

The Judgment and Order of the Court of Appeals was entered on April 11, 1967. An Order Amending Judgment and the Amended Judgment of the Court entered on June 7, 1967 are printed in Appendix B, 1b-3b. The order of the Court of Appeals denying rehearing was entered May 18, 1967, and is printed in Appendix B, 4b-5b. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

The questions presented arise in an action for treble damages for violation of the antitrust laws in which plaintiff below, The Hanover Shoe, Inc. (hereinafter Hanover) brought an action against defendant, United Shoe Machinery Corporation (hereinafter United) to recover damages for injuries from monopolization by United of trade in shoe machinery in violation of Section 2 of the Sherman Act.

The first question presented is whether the party damaged is required to reduce its damage calculations by whatever tax benefits it may have enjoyed as a result of leasing shoe machinery as compared with its tax situation had it been able to buy shoe machinery when, under

the decision of this Court in *Commissioner of Internal Revenue* v. *Glenshaw Glass Co.*, 348 U. S. 426 (1955), Hanover will be subject to tax on the full trebled amount of its recovery.

The second question presented is whether on the record in this case United monopolized the shoe machinery trade in violation of Section 2 of the Sherman Act during the full period of the applicable statute of limitations, i.e. from July 1, 1939 through September 21, 1955, or whether the decision of this Court in *American Tobacco Co.* v. *United States*, 328 U. S. 781 on June 10, 1946 requires that the conduct of United be held to have been lawful prior to that date and unlawful after that date so that Hanover may not, as a matter of law, recover damages for conduct of United prior to that date, although it may for the same conduct thereafter, the reason being that the decision of this Court in *American Tobacco* may be given only prospective and not retrospective application in so far as it may be applicable to the conduct of United.

Statutes Involved

The statutory provisions involved are Section 4 of the Clayton Act (38 Stat. 731; 15 U.S.C.A. §15), Section 5a of the Clayton Act (38 Stat. 731; 69 Stat. 283; 15 U.S.C.A. §16a) and Section 2 of the Sherman Act (26 Stat. 209; 69 Stat. 282; 15 U.S.C.A. §2). These statutes are printed in Appendix C hereto.

Statement of the Case

This is an action by petitioner, Hanover, against United to recover treble damages for violation of Section 2 of the Sherman Act through alleged monopolization of the shoe machinery industry and alleged monopolistic practices with respect to substantially all shoe machinery required and used by Hanover, a manufacturer of men's welt shoes.

After trial before the District Court without a jury the Court concluded that United had violated Section 2 of the Sherman Act in that, among other matters, United made its principal shoe machinery available to shoe manufacturer customers only on lease and that as a result of the unlawful monopolization Hanover was required to pay more for leasing the shoe machinery it needed and used than it would have been required to pay had it been able to buy machinery in a free and competitive market and that Hanover was injured and sustained damage thereby (R. 799a-800a). The District Court fixed the period of time for which Hanover might recover damages as July 1, 1939 through September 21, 1955 (R. 800a). There is no dispute as to the applicable Pennsylvania statute of limitations and the effect of the tolling provisions to extend it to the period stated (R. 790a, fn. 15; App. pp. 26a-27a). The District Court fixed the amount of Hanover's damage during this period of some 16 years as $1,413,203 (R. 859a) and entered judgment for $4,239,609 after trebling (R. 873a).

On appeal by United, the Court of Appeals vacated the judgment of the District Court as to damages and awarded a new trial limited to damages in accordance with the opinion of the Court (App. p. 33a).

The Court of Appeals held that the District Court had committed error:

A. In failing to reduce the amount of the damages by the amount of the tax advantages that had accrued to Hanover during the damage period by reason of leasing its shoe machinery from United rather than owning it.

The Court of Appeals accepted the theory of damages of Hanover which was that United's unlawful monopolization of the shoe machinery industry and United's policy of only leasing all machinery required by Hanover injured Hanover in that "Hanover was required to pay more on the leases for the use of its shoe machinery than it would have been required to pay if the machinery had been available for sale in a free and competitive market" (App. p. 27a). Leasing was the only way United's principal machines were made available to Hanover.

Hanover's damage claim is thus based on the injury done to it throughout the damage period by reason of having to "pay more on the leases" from the monopolist than if it had been able to buy and own its machines in an open competitive market.

The decision of the Court of Appeals requires a recomputation of the damages and for this purpose the judgment of the District Court was vacated and a new trial ordered to permit "United to show the favorable tax consequences which Hanover obtained from leasing and the unfavorable consequences which would have flowed from ownership of the machinery" (App. p. 31a).

The reasoning of the Court of Appeals was that the damage calculation must be adjusted to take account of "the tax elements which would bear on Hanover's choice of purchasing rather than leasing the machinery it required" (App. p. 30a). This assumes, contrary to fact, that Hanover had a choice between leasing and purchasing. It had no such choice. The Court added that "• • •

the award of damages should not exceed the difference between the two alternatives as Hanover itself would have computed it" (*id.*)—after tax. Of course, any such computation by Hanover would not reflect the effect of a second tax imposed upon a judgment that might be obtained in the future. If the alternatives referred to by the court had actually existed, there would have been no violation of law and, hence, no question of a later judgment subject to tax.

The District Court correctly recognized that, under *Glenshaw Glass, supra,* Hanover would be subject to tax on the entire amount of any recovery, R. 785a, and held that "The tax consequences are extraneous to the damage caused by United, and are not a part of the calculation" (R. 786a).

B. The Court of Appeals further held that the District Court had committed error in finding monopolization by United in violation of Section 2 of the Sherman Act during the full period within the statute of limitations, i.e. from July 1, 1939 through September 21, 1955.

An important item of proof in support of Hanover's claim of such monopolization was the final decree in *United States* v. *United Shoe Machinery Corporation,* 110 F. Supp. 295, *affirmed, per curiam,* 347 U. S. 521 (1954), (hereinafter the Government case), an action in which United was found to have violated Section 2 of the Sherman Act by monopolizing the shoe machinery trade and commerce among the several states. This Court, in affirming, *per curiam,* the judgment of the District Court, stated that it did so "being satisfied that the findings are justified by the evidence and support the decree," (347 U. S. at p. 521). This final decree, with its adjudication that United had violated Section 2 of the Sherman Act by monopolizing

the shoe machinery trade, was offered and received in evidence under Section 5a of the Clayton Act (15 U.S.C.A. §16a) as prima facie evidence of the alleged violation.

The Court of Appeals found that the decision in the Government case "demonstrates that the lease-only system itself was adjudicated in the Government case to be a means of monopolization," (App. p. 19a) and that Hanover was entitled to the benefit of this determination in the present action. The Court of Appeals correctly rejected United's contention that the adjudication of monopolization in the Government case operated only prospectively from the date of the decree therein and had no retrospective effect (App. p. 20a) but it then proceeded to hold that retroactivity did not extend to the beginning of the statutory period of limitation on July 1, 1939 but must be cut off on June 10, 1946 (App. pp. 24a-25a). The result of this decision was to require a recomputation of damages limited to the period after this newly-fixed date. The judgment below was, therefore, vacated and a new trial ordered limited to the recomputation of damages in accordance with the opinion of the Court.

The reasoning of the Court of Appeals in fixing a cut off date on June 10, 1946 was that this was the date of the decision of this Court in *American Tobacco Co.* v. *United States, supra;* that prior to that date a necessary element in a violation of Section 2 of the Sherman Act was proof of predatory practices; that in the Government case the District Court had found an absence of predatory practices by United; that it followed that United had not violated Section 2 of the Sherman Act prior to June 10, 1946 and that it also followed that, absent a violation of law during the period prior to June 10, 1946, Hanover might not recover damages for acts of United prior to that date.

As a part of this line of reasoning the Court of Appeals accepted the decision of the District Court in the Government case that United was guilty of monopolization but only after June 10, 1946 under the rule announced in the *American Tobacco* decision, *supra*, and held that the decision in the Government case could not be given any further retroactive effect. The Court of Appeals observed that the retroactive effect to be given to a decision of a court "should be determined from the circumstances of the particular case, having in mind the purpose which the new rule of law [that of the *American Tobacco* decision] seeks to accomplish and the practical weighing of the comparative benefits and evils of retroactivity" (App. p. 23a). It was concluded that it was unjust to impose "the penalty of treble damages" retroactively (*id.*). The Court of Appeals then referred to the fact that United had been involved in antitrust litigation that reached this Court on three occasions prior to the loss of the Government case and that these earlier decisions gave United's counsel grounds for belief that its lease-only policy stood under "the shelter of Supreme Court approval" (App. p. 22a) until the change of law occurred on June 10, 1946 and that, as a consequence, United might carry on its practices in reliance upon those earlier decisions until June 10, 1946 when the *American Tobacco* decision presumably provided fair warning that all might not be well for United on the antitrust front.

The point stated above was neither briefed nor argued before the District Court or the Court of Appeals. The District Court correctly concluded that the proof before it showed a violation of the antitrust law by United throughout the period of limitations. The Court of Appeals, we submit, erred in vacating the judgment of the District Court on this point.

The Reasons for Granting the Writ

As to the tax error:

1. The Court of Appeals erred in failing to give effect to the decision of this Court in *Commissioner of Internal Revenue* v. *Glenshaw Glass Co., supra,* under which Hanover will be subject to income tax on the full trebled amount of its recovery. Instead, the Court of Appeals required Hanover to deduct from its computation of damages the difference between the tax consequences to it of leasing machinery from the wrongdoer and ownership in a free and open market during the damage period. The result of this decision is to benefit the wrongdoer at the expense of Hanover. This benefit flows from the fact that the victim of the wrongdoing is required to give effect to tax consequences twice—once in the calculation of damages and again when, under the *Glenshaw Glass* decision, taxes are paid on the recovery remaining after deducting taxes.

The consequence of this decision is illustrated by the following example:

All figures are assumed:

	Assuming Machinery is Leased	Assuming Machinery is Owned
Annual gross revenues	$2,000	$2,000
Less annual tax-deductible lease charges	1,000	
Less annual tax-deductible depreciation		400
Net income before taxes	$1,000	$1,600
Net income after taxes at assumed rate of 50%	$ 500	$ 800

Hanover claims as its damage and the District Court awarded to it damages based upon the difference between the leasing and ownership costs before taxes, which is $600. After tax has been paid on this recovery under the *Glenshaw Glass* decision, the after tax recovery will be $300.

Under the decision of the Court of Appeals, however, Hanover will be entitled to recover as damages only $300 which is the difference between the after tax ownership cost of $800 and after tax lease cost of $500. Hanover will then pay a tax on this recovery under the *Glenshaw Glass* decision and its after tax recovery will then be $150. This, we submit, is clearly at odds with Section 4 of the Clayton Act which provides that a plaintiff is entitled to recover the damages it sustains and to have such damages trebled by the court. The introduction of tax consequences into the damage calculation in the decision of the Court of Appeals is beneficial only to the wrongdoer and prejudicial only to the victim.

2. The decision of the Court of Appeals, if it stands, will introduce a novel and unjust result into all treble damage actions with the result that the important part that treble damage actions play in the enforcement of the antitrust laws will be seriously impaired to the benefit of the wrongdoers. The question presented is, therefore, one of public importance in the enforcement of the antitrust laws.

3. The decision of the Court of Appeals below reducing the actual damages sustained by defendant by a double application of federal income taxes is, so far as we have been able to determine, wholly novel. It is contrary to findings of damage by other circuits which, both before

and after *Glenshaw Glass*, have uniformly omitted tax consequences in determining damages.*

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* *2d Circuit:* *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 (2d Cir. 1924) (Action under Section 7 of the Sherman Act and Section 4 of the Clayton Act holding that plaintiffs' damages are the difference between what the Macy partners paid for defendant's merchandise and the price they would have paid in a free and open market. There is no clearer statement of the law as it existed until the decision by the 3rd Circuit below than appears in this case:

"They contended for a rule of damage which seeks the proximate cause of damage and the proximate result occasioned by that cause. In a case just decided, dealing with an entirely different question, Mr. Justice Holmes has used a terse phrase here applicable:

'On the other hand, the common understanding is that in construing these policies we are not to take broad views, but generally are to stop our inquiries with the cause nearest to the loss.' Queen Insurance Co. of America v. Globe & Rutgers Fire Insurance Co., 44 Sup. Ct. 175, 68 L. Ed. , decided January 7, 1924.'

"And in Southern Pac. Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531, 533, 38 Sup. Ct. 186, 62 L. Ed. 451, the same Justice said:

'The general tendency of the law, in regard to damages, at least, is not to go beyond the first step.'

"Here the defendants themselves adduced testimony that the price charged by distributors to dealers under the price schedule of Victor Company was reasonable. The jury must have so found. Plaintiffs were compelled to pay more than this reasonable price. Why? Manifestly because the illegal combination forced them so to do in order to carry on the requirements of their business. Whether, then, plaintiffs sold to their customers at a profit or loss becomes immaterial in this case. They were entitled to goods at the reasonable price thereof. Through no legal fault of theirs, but because of defendants' wrong, they were deprived of their right, and the jury could find that such deprivation defined in money was the difference between the established reasonable price and the amounts plaintiffs were compelled to pay, provided as the trial judge charged, "they acted reasonably in making these payments." Thomsen v. Cayser, 243 U. S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322; also see 166 Fed. 251, 253, 92 C.C.A. 315; Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241; Montague v. Lowry, 193 U S. 38, 24 Sup. Ct.

This Court should grant review of this issue since the decision of the Court of Appeals on the question of the applicability of income taxes in the computation of damages has created a difference between circuits on this issue. The question is one which this Court should settle.

4. The important question of federal law here presented is one that has not been but should be settled by this Court. The decision of this Court in the *Glenshaw Glass* case settled the question as to the taxability of the recovery in a treble damage action. The question

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307, 48 L. Ed. 608. It is thus unnecessary to 'go beyond' this first step." (297 Fed. at p. 803.)

5th Circuit. *North Texas Producers Assn.* v. *Metzger Dairies*, 348 F. 2d 189 (5th Cir. 1965), *cert. denied*, 382 U. S. 977 (1966). (Action under Section 2 of the Sherman Act. Approximately 60% of the total damages of $606,000 was assessed as the increased cost of obtaining monopolized product.)

7th Circuit. *A. C. Becken Co.* v. *Gemex Corp.*, 1961 Trade Cases ¶70,118 (N.D. Ill. 1961), *affd.* 314 F. 2d 839 (7th Cir. 1963), *cert. denied*, 375 U. S. 816 (1963). (Action under Section 1 of the Sherman Act; damages assessed at the amount of gross profits on sales less additional salesmen's commissions.)

8th Circuit. *Charles Rubenstein, Inc.* v. *Columbia Pictures Corp.*, 176 F. Supp. 527 (D. C. Minn. 1959), *affd.*, 289 F. 2d 418 (8th Cir. 1961). (Action under Sections 1 and 2 of the Sherman Act; damages computed on the basis of gross receipts minus a percentage of film rentals and plaintiff was awarded the difference in the net gross box office return which would have been achieved as compared with actual net gross box office return.)

9th Circuit. *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F. Supp. 393 (D. C. Idaho 1964), *affd.*, 351 F. 2d 851 (9th Cir. 1965), *cert. denied*, 383 U. S. 936 (1966). (Action under Section 3c of the Clayton Act relating to commercial bribery and rebates. Damages found to be an estimated profit of 15% on anticipated sales.)

10th Circuit. *Union Carbide and Carbon Corp.* v. *Nisley*, 300 F. 2d 561 (10th Cir. 1961), *appeal dismissed*, 371 U. S. 801 (1962). (Action under Sections 1 and 2 of the Sherman Act. Damages computed as the difference between price paid to plaintiff for ore and price plaintiff would have received but for defendant's antitrust violation.)

here presented is the counterpart of the question in that case and it should be reviewed and settled by this Court so that the tax consequences to a victim during the damage period will be known and understood. This is, we repeat, a matter of continuing importance in all treble damage actions as well as a matter of public importance in the enforcement of the antitrust laws. Unless this point is reviewed and settled, the important effect of the decision of this Court in the *Glenshaw Glass* case will be lost in that, if in addition to the tax on the recovery, the victim is required to deduct taxes from his damage calculation the result will necessarily be a double tax and the fair result reached in the *Glenshaw Glass* case will be seriously whittled away and undermined, if not largely destroyed, the only beneficiary being the wrongdoer.

5. The view taken by the District Court was that tax consequences are not a part of the damage calculation (R. 786a). This decision was correct and was in accord with the rule of law that in tort and breach of contract cases taxes are not considered in assessing damages (R. 785a). This decision is also in accord with the decision of the late Judge Goodrich on the separate trial of the defense of United that Hanover had not been damaged because Hanover had passed on its loss to its customers in the sale of shoes. The District Court rejected this defense, *The Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation,* 185 F. Supp. 826 (M.D. Pa. 1960), *aff'd,* 281 F. 2d 481 (3d Cir. 1960), *cert. denied,* 364 U. S. 901 (1960) and stated "The plaintiff's injury occurred when it was charged too much for the machinery", and added:

> "If it had not thus been illegally charged for machinery it would have had more money to pay

> out in dividends, or to engage in a further development campaign to sell its shoes, or to raise the wages of its employees, or to enlarge its bank account as protection against a rainy day, or for all of these things. The plaintiff against whom a tort is committed has his cause of action at the moment that the tort occurs. Of course, he is subject to the rule of avoidable consequences and cannot sit still and let damages pile up when reasonable steps would have prevented further consequential damages. But that is the extent of his obligation." 185 F. Supp. at 829.

Judge Goodrich's decision supports the correct rule that tax consequences have no part in the damage calculation. It was error of the Court of Appeals to require that they be considered.

As to the error fixing a cut off date for damages other than the applicable statute of limitations.

1. The Court of Appeals construed the decision of this Court in *American Tobacco Co.* v. *United States,* 328 U. S. 781, decided June 10, 1946, as working such a change in the statutory offense of monopolization in violation of Section 2 of the Sherman Act that defendant United was to be treated as not having violated Section 2 prior to the date of that decision, even though United had been found to have violated Section 2 in the Government case in a decision that became final in the *per curiam* decision of this Court on May 17, 1954 and even though the final decree in the Government case was received in evidence at the trial below as prima facie evidence of monopolization and said final decree adjudicated the violation of Section 2 by United without any limitation as to time or any declaration that either the

adjudication of violation or the remedial provisions of the final decree were to be given only prospective effect or were to be limited in any way. This Court in affirming the adjudication of monopolization in the final decree in the Government case stated that this Court was "satisfied that the findings are justified by the evidence and support the decree." 347 U. S. 521 (1954).

We submit that review by this Court is required to determine whether the decision of this Court in *American Tobacco* made such a change in the statutory offense of monopolization in violation of Section 2 of the Sherman Act that United's continuing offense of monopolization, as charged in the instant case and as charged and adjudicated in the Government case, is to be treated in a treble damage action as having arisen only after the date of the decision of this Court in *American Tobacco.*

We submit, further, that review by this Court is required to determine whether this Court's affirmance, *per curiam,* of the decision of the District Court in the Government case is to be treated in a treble damage action as an adjudication of monopolization that is to be given only limited effect in retroactive application. Only this Court may make such a determination.

We submit that the Court of Appeals erroneously misconstrued the decision of this Court in *American Tobacco* when it gave it only prospective effect so that, as a consequence, although United's monopolistic acts were the same both before and after the date of that decision, they were to be treated as lawful before and unlawful after it. The Court of Appeals also erred in failing to give full retroactive effect to the adjudication of monopolization by this Court in the Government case.

2. The decision of the Court of Appeals has introduced into our antitrust law the concept that the retro-

active effect to be given to a decision of a court in an antitrust case is to be determined from "the circumstances of the particular case, having in mind the purpose which the new rule of law seeks to accomplish and the practical weighing of the comparative benefits and evils of retroactivity" (App. p. 23a).

We ask this Court to review this decision because the foregoing rule was stated with reference to the decision of this Court in *American Tobacco* and only this Court is in a position to decide whether "a new rule of law" was announced in that decision and what may have been the purpose thereof and, further, if a new rule was announced or even if not, the retroactive effect to be given to this decision.

We submit that the new rule as to retroactivity proposed by the Court of Appeals for antitrust decisions has no support in any decision of this Court, that it is erroneous, that it will impair the institution of treble damage actions as a useful instrument in the enforcement of the antitrust laws, that it will work injustice in the instant case and that it should be rejected.

The point is of public importance in its effect on all treble damage actions under the antitrust laws. This is shown by the effect produced in the instant case. The new rule has been used to nullify the claim of the victim for reimbursement and to spare the wrongdoer "the penalty of treble damages" at the expense of the victim. The plain fact is that injury to Hanover was just as great both before and after the decision in *American Tobacco*.

3. The Court of Appeals erroneously construed the three early decisions of this Court in which United was a defendant in antitrust actions brought by the United

States* and concluded that it was error for the District Court to have awarded damages to Hanover "for conduct manifestly pursued in the shelter of Supreme Court approval" (App. p. 22a). We submit that it was error to conclude that the conduct that was in issue in the Government case and that was found to be violative of Section 2 of the Sherman Act in the *per curiam* decision of this Court was pursued "in the shelter of Supreme

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* *United States* v. *Winslow*, 227 U. S. 202 (1913) involved an indictment that, as construed by the District Court, attacked only the original combination of 1899 under which United was created. On demurrer, the indictment was held not to charge an offense under the Sherman Act. The leasing practices and provisions were not in issue, id. at 217.

United States v. *United Shoe Machinery Co.*, 247 U. S. 32 (1918) was an unsuccessful civil action to dissolve United. The decision of the District Court dismissing the complaint was affirmed. The Court held that the plants and patents of the companies that were combined in the original combination were supplementary and non-competitive, id. 38-56. The leasing arrangements were sustained as lawful exercises of patent rights, id. 57-65. See also infra 258 U. S. 451 at 460. It is in this 1918 opinion of Mr. Justice McKenna that remarks are made as to the advantages of the leasing arrangement to shoe manufacturers big and little, id. at 63, the advantage in the service of United and the excellence of its machines, id. at 64, 66. None of these passing encomiums alter the holding that the leasing arrangements were sustained as lawful exercises of patent rights, id. 61-65.

United Shoe Machinery Corporation v. *United States*, 258 U. S 451 (1922) was a civil action under Section 3 of the Clayton Act to enjoin use of leases of shoe machinery containing certain restrictive tying clauses. This Court noted that while the former decision rested on the validity of the restrictive conditions under patents held by United, the present case was brought under the Clayton Act which expressly applied to leases of machinery whether "patented or unpatented." The Court added that the validity of the restrictive tying clauses under the Clayton Act test "was not and could not have been involved or decided in the former suit," id. at 462. The Court held that the leases were made on conditions prohibited by Section 3 of the Clayton Act. United's lease only policy which, together with the restrictive clauses in its leases, was found by Judge Wyzanski in the Government case to constitute monopolization under the Sherman Act, was not under attack or in issue in this Clayton Act case.

Court approval" when the matters in issue in the Government case were not in issue or in any way before this Court in the three prior cases. In addition, the Court of Appeals misapplied these three earlier decisions in holding that the effect to be given to them was to render it erroneous for the District Court to award damages to Hanover for the conduct of United prior to *American Tobacco, supra,* as shown in this record and which was adjudicated as violative of the Sherman Act in the Government case.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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